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TABLE OF AUTHORITIES

STATUTES AND RULES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 11

IGOR A. IVANOV, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER IGOR A. IVANOV

JURISDICTION

The opinion of the Court of Appeals, reported at 384 F.2d 554 (3d Cir. 1967), was rendered with its judgment on October 6, 1967. By order of October 25, 1967, Mr. Justice Brennan extended the time for filing the petition for certiorari to and including November 25, 1967. By order of November 14, 1967, Mr. Justice Brennan extended the time for filing the peti-

tion for certiorari to and including December 5, 1967. A motion to amend the petition for certiorari was filed January 23, 1968 and granted June 17, 1968. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Igor A. Ivanov, a citizen and national of the U.S.S.R. and an employee, during the relevant time period, of the Soviet trading company, Amtorg, was convicted of conspiracy to transmit to the U.S.S.R. information relating to the national defense, 18 U.S.C. § 794(a), (c), and of conspiring to violate the foreign agent registration provisions of 18 U.S.C. § 951. His conviction upon the latter count was reversed by the court of appeals. His co-defendant in the trial court, John W. Butenko, is petitioner in No. 197. The facts of this case are set out in the petition for certiorari, and in the opinion of the court of appeals.

The petition for certiorari raised four questions, but contained the following footnote to the "Questions Presented:"

> "[1] No question is raised concerning illegal electronic surveillance, on the assumption that the Solicitor General will, if there was any, disclose its presence. See Petition for Rehearing, *Kolod* v. *United States,* No. 133, October Term, 1967."

The Solicitor General responded as follows:

> "* With regard to fn. 1 appended to the statement of 'questions presented' in No. 885, it has been determined that there is nothing to disclose pursuant to the policy of the Department of Justice as described to this Court in the government's memorandum opposing rehearing recently filed in *Kolod et al.* v. *United States,* No. 133. Brief for the United States In Opposition, p. 2."

Petitioner promptly moved to amend the petition for certiorari to raise the additional question presented by the Solicitor General's obfuscatory reticence. As phrased in the motion, the question was:

> "5. Whether, when the Department of Justice has in its possession recordings of a criminal defendant's voice—or of the voice of a co-defendant—obtained through electronic surveillance, the Department may refuse unqualifiedly to disclose the existence and contents of those recordings unless in its untrammelled discretion, free from judicial control, it determines *both* that the Surveillance 'is or may be unlawful' *and* 'that the government has thereby obtained any information which is arguably relevant to the litigation involved.'"

Then the Court decided *Kolod* v. *United States,* 390 U.S. 136 (1968). The Solicitor General responded ("Response to Motion to Amend the Petition for Certiorari"), consenting to the amendment, and confessing that the court of appeals' judgment should be vacated and the cause remanded to the district court for a hearing or illegal electronic surveillance. Petitioner agreed to this proposal, upon the assumption that such a course would preserve to him his right to have all his claims of error presented in a petition for certiorari at some point.

This Court, on June 17, 1968, granted the motion to amend and the petition for certiorari, limiting its grant to the following questions:

> "On the assumption that there was electronic surveillance of petitioner or a codefendant which violated the Fourth Amendment,
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> (1) Should the records of such electronic surveillance be subjected to in camera inspection by

the trial judge to determine the necessity of compelling the Government to make disclosure of such records to petitioner, and if so to what extent?

(2) If in camera inspection is to be authorized or ordered, by what standards (for example, relevance, and considerations of national security or injury to persons or reputations) should the trial judge determine whether the records are to be turned over to the defendant?

(3) What standards are to be applied in determining whether petitioner has standing to object to the use against him of information obtained from such illegal surveillance? More specifically, if illegal surveillance took place at the premises of a particular defendant,

(a) Does that defendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?

(b) Does a codefendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?",

Petitioner adopts the position of petitioners in No. 133, October Term 1967, *Alderman* v. *United States*, as to the issues set out in the Court's question, and notes as well the substantial similarity of views between this brief and that filed on behalf of petitioner Butenko in No. 197. Petitioner will seek not to repeat arguments made in those briefs since the cases have been consolidated for argument and counsel have extensively discussed the cases among themselves and have come to adopt a substantially similar approach.

ARGUMENT

I. ADVERSARY PROCEEDINGS, WITH FULL DISCLOSURE OF ALL SURVEILLANCE OF PETITIONERS, IVANOV AND BUTENKO, OR OF THEIR PREMISES, AND OF THE UNINDICTED ALLEGED CO-CONSPIRATORS, ARE CONSTITUTIONALLY REQUIRED.[1]

A. Relevance

The object and end of a suppression inquiry is "relevance"—in the sense of relation of the primary illegality to the government's proof:

> "the exclusionary rule has no application . . . [when] the Government learned of the evidence 'from an independent source.' . . . [or when] the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" *Wong Sun* v. *United States,* 371 U.S. 471, 487 (1963).

See Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized,* 56 Calif. L. Rev. 579, 593 (1968). The decision of the trial court on a suppression motion is thus a determination of fact concerning an essentially "causal" question. Did the challenged evidence arise from, or may it be traced to, an illegal source?[2] In an electronic surveillance case, this question is quite difficult to define, for the instances of

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[1] In this case, the testimony of FBI agents was extensively used in proof of the alleged conspiracy. If any of these agents participated in the illegal surveillance, the logs and summaries of their activity may be producible under the Jenks Act, 18 U.S.C. § 3500. This issue would require further exploration in the trial court upon remand and petitioners do no more than mention it.

[2] A perceptive and scholarly approach to this problem is taken in *United States* v. *Schipani,* 63 CR 237 (E.D.N.Y. Jul. 26, 1967) (Weinstein, J.).

governmental illegality in this sphere, and the uses to which the unlawfully-gained evidence may be put, are myriad.[3] The question is not, as in a typical narcotics case, "did this piece of verbal evidence, unlawfully obtained, lead the police to the defendant's heroin cache?" It is far more complex than that posed by a blurted-out two or three sentences in a laundry on Leavenworth Street. See *Wong Sun* v. *United States,* 371 U.S. at 474, 487-88. It is that posed by hundreds and thousands of sentences and bits of private conversation recorded, noted, taken down, and then carefully masked behind such terms as "confidential informant" and filed away for retrieval by government agents and government lawyers when a prosecution impends. The files are there and remain. The administration in office at this writing has said that it plans no more additions to these files, but this administration will not always be in office and the Crime Control Act, Pub. L. 90-351, gives additional reason carefully to consider the problem as a current one. And of course even this administration will continue its surveillances in "national security" cases, whatever that term may come to mean. A final point in introduction: the burden of proof is the government's. The government must convince a judge that its evidence is lawfully-obtained. Petitioners take it that doubt on this score was dispelled by *United States* v. *Coplon,* 185 F.2d 629 (2d Cir. 1950), and now the matter is settled by *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52, 79 n. 18 (1964), and *United States* v. *Wade,* 388 U.S. 218, 241 (1967). This is the conclusion also of the District of Columbia Circuit, *Baker* v. *United States,* No. 21, 154 (Aug. 9, 1968), slip op., p. 48. See *United States* v. *Schipani, supra* note 2. But settled or no, common sense dictates that

[3] See the instances and uses recounted in the brief in *Alderman,* Point I.

the government, in possession of the stolen goods and responsible for mixing them up with lawfully-obtained materials, should have the obligation to sort out the information and show itself to be innocent.[3a]

If the above correctly sets out the parameters of the inquiry, then it remains to ask: How should the question of relevance be decided? The government seeks to invoke summary procedures and *in camera* determinations. Perhaps this question can best be seen out of the light of emotional discourse and in the perspective of history. The preference for taking testimony in open court as a means of solving issues of fact is an old one. On the law side of the courts, it has roots in the 16th century at the latest. Smith, De Republica Anglorum, Bk. 2, ch. 15 (1583). Trial by deposition was abolished on the equity side of the federal courts in 1912, save for "good and exceptional cause." See Lane, *The Federal Equity Rules,* 46 Harv. L. Rev. 638, 651 (1933). The limited grant of summary judgment power under the Civil Rules, F.R.Civ.P. 56, has been interpreted by this Court narrowly, at least when the values of adversary inquiry are in the balance, and these values are always in the balance when the proof is in the hands of one party and "hostile witnesses thicken the plot."[4] *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473 (1962); *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620 (1944). The reasons for these decisions are persuasive and help solve the problem which is before the Court. The government has all the evidence. If it says "X is so," and swears to it, there is nothing petitioner can do to rebut that contention. The only way petitioner *can* make rebuttal

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[3a] Compare Prosser, Torts §§ 39-40 (3d ed. 1964).

[4] These "hostile witnesses" have even been found lurking in bedchambers, *Black* v. *United States,* 385 U.S. 26 (1966), and antechambers.

is through cross-examination of live witnesses and examination of logs and summaries.[5] Moreover, even in a "trial by affidavit," conclusory assertions are disfavored and the proceedings are adversary in form. See *Coplon*, 185 F.2d at 638-39..

In the process of determining whether the government's case is tainted, there is but one way logically to proceed. If the proposition be accepted that the government must demonstrate either that its proof had an independent source or that the evidence it wishes to use is so far removed from the primary illegality as to dissipate the taint, see *Wong Sun*, 371 U.S. at 487, it must prove, in essence, a lack of casual connection. In the "independent source" instance, the government cannot, as a matter of simple logic, demonstrate that its case is free of taint without tracing from the illegality to its evidence, and showing that none of the illegal material was used. An attempt to pursue an alternative source, for example by showing that its case had a "legal" source, is patently inadequate, for while such a technique may establish that one possible source of the disputed evidence was lawful, it cannot prove that the disputed evidence had that legal source to the exclusion of all other possible sources.[6] In a "dissipation of the taint" case, it is similarly impossible to demonstrate the ultimate fact in issue without tracing the illegality from its source through all the channels in which it flowed and in all the forms that it took.

Therefore, the government cannot seek to limit disclosure based upon considerations of relevance, for

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[5] The danger of "trial by affidavit" under such circumstances is also shown by the actual cases set out in *Arnstein* v. *Porter*, 154 F. 2d (2d Cir. 1946).

[6] *Compare United States* v. *Schipani, supra.*

relevance is the very matter in issue. Compare *United States* v. *Coplon,* 185 F.2d at 638-39.

But the government would go farther than restrictions based upon relevance. It counsels that the inner workings of the investigative process are in danger of being disclosed, that the privacy and physical safety of third persons are at stake, and that the national security is imperiled. The issues of "inner workings" and third persons' rights are dealt with in the brief in *Alderman* v. *United States,* filed the same day as this brief. Petitioner turns to the issue of national security.

B. The National Security

1. The national security ought not to be invoked to deny or defer, although it may be used to restrict, disclosure of "bugging" records.

"National security" is a term often and carelessly used. Perhaps only the term "un-American" is vaguer and more laden with serious implicit consequences for the orderly conduct of political affairs and judicial inquiry. See *Watkins* v. *United States,* 354 U.S. 178, 202 (1957). We may begin with the observation that the term "national security" ought not to be the talisman of pro tanto suspension of the due process clause and the right to a fair hearing: "The requirement of due process is not a fair-weather or timid assurance." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). And see *Rex* v. *Bodmin Justices,* [1947] K.B. 321, 325, All Eng. 109 ("justice must not only be done but must manifestly be seen to be done"). If there is a right to have excluded from evidence the fruits of the government's unlawful conduct—and there surely is—then that right should not be whittled away in the name of

procedural expedience or even of terrible dangers to the nation's well being. This is so because the dangers set in train by compromising with the fourth amendment are more terrible yet.[6] The fourth amendment carries within it no exemptions for spycatchers and subversive-hunters.[7] The case of *Entick* v. *Carrington,* 19 How. St. Tr. 1029 (1765), often cited in this Court's reports, involved papers thought libelous and potentially subversive of the public order, and yet the authors of that search were brought to judgment for a trespass. The writs of assistance were thought by the Crown to be justified to maintain the security of British rule and therefore of established government. Yet this Court has not retreated from support of James Otis's denunciation of them. See *Boyd* v. *United States,* 116 U.S. 616, 625 (1886). Even the "executive warrant" for searches in national security case, tentatively advocated by Mr. Justice White, *Katz* v. *United States,* 389 U.S. 347, 363 (1967), would run counter to established fourth amendment law. *Frank* v. *Maryland,* 359 U.S. 360, 363 (1959).[8] We pass, therefore, to consideration of the sort of hearing which should be held in determining the impact of illegal "national security" sur-

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[7] The government has conceded as much. See Reply Memorandum for the United States, filed herein in March 1968: "Petitioner Ivanov suggests that the government is arguing that where it has used electronic surveillance to catch a spy, the spy should not be allowed to challenge the legality of that surveillance. However, that is not the government's position." P. 1.

[8] This view of the Court in *Frank* as to the illegality of executive warrants was not doubted by the dissenters there, and remains vital despite the decisions in *Camara* v. *Municipal Court,* 387 U.S. 523 (1967) and *See* v. *City of Seattle,* 387 U.S. 541 (1967). Compare Douglas & Brennan, JJ., concurring in *Katz,* 389 U.S. at 359.

veillance upon the evidence adduced in federal criminal cases.

The Solicitor General has in the past cited a number of cases dealing with the executive prerogative in the fields of national security and foreign relations. But we do not take those cases to be at all relevant. It might be said, though petitioner denies that a court would not at the instance of a civil plaintiff upset an executive determination that the nation's security requires there to be undisclosed illegal electronic surveillance in a narrow class of cases.[9] Such a conclusion would of course call into question the continued vitality of *Reynolds* v. *United States,* 345 U.S. 1 (1953) and *Zimmerman* v. *Poindexter,* 74 F. Supp. 933, 936 (D. Hawaii 1947), but it might in the event be reached. It would not, however, touch the question now before the Court. Here the petitioner is a criminal defendant, not a civil plaintiff, and it is the government which seeks dramatically to change the status quo by putting him into prison for a very long time. Judicial review claimed illegality is in such a case a judicial responsibility. See generally Hart & Wechsler, The Federal Courts and the Federal System 312-40 (1953). So long as the executive branch stays out of the courts, its "right to be let alone" is perhaps arguable, but when it comes into court it must be bound by the rules

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[9] Compare *Totten* v. *United States,* 92 U.S. 105 (1875) (plaintiff could not sue on a contract to commit espionage). A cogent exposition of this problem of state secrets in civil litigation appears in *Ticon Corp.* v. *Emerson Radio & Phonograph Corp.,* 206 Misc. 727, 134 N.Y.S. 2d 716 (1954). See also *Royal Exchange Assur.* v. *McGrath,* 13 F.R.D. 150 (S.D.N.Y. 1962).

fashioned by the judiciary and the Congress for the protection of litigants' rights.[10]

This is the fundamental principle grasped in *United States* v. *Coplon,* 185 F.2d 629 (2d Cir. 1950), and *United States* v. *Andolschek,* 142 F.2d 503 (2d Cir. 1944), and adopted in this Court's opinions in *Jencks* v. *United States,* 353 U.S. 697, 670-72 (1957) and *Dennis* v. *United States,* 384 U.S. 855, 873 n. 20 (1966). If the government wants to keep secret its closet full of wrongdoing, then it must stay out of the criminal courts. This does not mean that its secrets must be broadcast to the world. Federal Rule of Criminal Procedure 16(e) provides a means by which those with a right to see may be placed under protective orders regarding disclosure of that which is placed in their hands. Such a procedure was used in the trial of this case as to certain Strategic Air Command materials allegedly taken from the car in which Ivanov was riding. See "Order Permitting Defendant Ivanov to Inspect," entered April 21, 1964, reprinted in the Appendix to Appellant's Brief in the Court of Appeals, Vol. I, p. 19a. The government may argue that protective orders are inadequate, but the difficulties it perceives are based upon the assumption that district judges cannot enforce compliance with orders to which they attach the greatest importance and which are principally addressed to members of the bar. Moreover, if the government is unwilling to permit disclosure to the extent required for a full-dress adversary

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[10] A cogent exposition of this problem of state secrets in civil litigation appears in *Ticon Corp.* v. *Emerson Radio & Phonograph Corp.,* 206 Misc. 727, 134 N.Y.S.2d 716 (1954). See also *Royal Exchange Assur.* v. *McGrath,* 13 F.R.D. 150 (S.D.N.Y. 1962).

See *Olmstead* v. *United States,* 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting).

hearing, upon whom should the consequences of that choice be visited? Petitioners respectfully suggest that our law provides but one answer: the government. See *United States* v. *Cotton Valley Operators Committee,* 9 F.R.D. 719 (W.D.La. 1949), *aff'd by an equally divided Court,* 339 U.S. 940 (1950). *Cf. Reynolds* v. *United States,* 345 U.S. 1 (1953), and compare the unanimous opinion of the Third Circuit in the case, 192 F.2d 987 (3d Cir. 1951), subscribed to by Justices Black, Frankfurter and Jackson, 345 U.S. 12.

2. If "national security" is to justify denial or deferral of disclosure, the denial or deferral must be attended with procedural safeguards.

The bare claim of privilege by the government will never conclude its opponent. The English rule is apparently to permit such a claim decisive force, Wigmore, Evidence § 2379, at 808-810 (McNaughton rev. 1961), but in the United States the rule is otherwise. *Ibid.* Unsettled is the manner in which the claim of privilege is to be considered and ruled upon by the trial court. In, *e.g., Reynolds* v. *United States,* 345 U.S. 1 (1953), the Court addressed the question in a civil case. It held that in passing upon a claim of governmental privilege, the trial judge must be ruled by the same considerations which guide him in passing upon a claim of the privilege against self-incrimination. In such a case, the judge may not inquire so far into the basis of the claim that he defeats its object by forcing disclosure of the very thing which the privilege is designed to protect.[11] *Reynolds* held that so far as the allegedly secret Air Force reports there involved were concerned, the government would not be required to

[11] 345 U.S. at 9, citing *Hoffman* v. *United States,* 341 U.S. 479, 486 (1951).

disclose—even to the trial judge *in camera*—so much that the secret would be let out.

However, the rule of *Reynolds* must not be taken to have strict application here. Reynolds was a civil plaintiff; petitioner is a criminal defendant. See *Reynolds* v. *United States,* 192 F.2d 987. The analogy to the fifth amendment is not in this case quite so persuasive, for the fifth amendment privilege must be broadly construed in order to effect its great object. That object—a prohibition on testimonial compulsion—lies at the root of the adversary system. The cases since *Reynolds* have shown just how far the privilege extends. *E.g., Emspak* v. *United States,* 349 U.S. 190, 197-201 (1955), 198-200 (1955). In this case, the privilege at stake, far from upholding the values of fair adversary procedure, tends to defeat them and must therefore be strictly construed. See generally *Dennis* v. *United States,* 384 U.S. 855, 875 (1966); *Campbell* v. *Eastland,* 307 F.2d 478, 486 (5th Cir. 1962) (dictum). As a factual matter, it should also be noted that we are here dealing with a mass of integrated material, in which the secrecy claim may be made as to individual words, phrases, sentences and names, and in such a circumstance denial to the trial judge of the opportunity to conduct a full inspection is really impracticable. See the excerpt from the Black transcript, Brief for Petitioners, *Alderman* v. *United States,* pp. 13-16.

The procedure properly to be followed in ruling on claims of privilege is a modified adversary procedure, as set out in the first *Campbell* case, *Campbell* v. *United States,* 365 U.S. 85, 92-99 (1961), including when necessary the taking of extrinsic testimony. In this process, "[r]eliance upon the testimony of the witness based

upon his inspection of the controverted document must be improper in almost any circumstances." This is because "[t]he very question being determined . . . [is] whether the defense should have the document. . . ." 365 U.S. at 97. *Campbell* counsels that in ruling upon claims of producibility the trial judge and counsel for both sides must participate to ensure that the ruling is based upon the fullest possible knowledge of the relevant circumstances. From the prosecution side will come witnesses attesting to the importance of restricting disclosure and testifying as to the circumstances which lend credence to a view that nondisclosure will not subvert the adversary inquiry on "taint," and that the government ought not be put to the "disclose or dismiss" option. From the defense will come argument, based upon documents turned over without claim of privilege or turned over after a claim has been overruled, as to the possible importance of the material in the determination of taint *vel non*. In this process, the overriding factor will be the government's obligation to make its proof that it has decontaminated its evidence. And when a party with the burden of proof sticks at rendering up evidence necessary to the disposition of his claim, judgment must go against him to the extent of his refusal or failure to produce.

This suggested procedure can be the matter of only the most general discussion. Its details will remain to be worked out in case after case in the district courts, subject always to this Court's power to review what is done. But if petitioner's primary claim on the scope of the hearing is not accepted, it is submitted that this procedure is the maximum feasible compromise with basic fourth, fifth and sixth amendment principles.

II. EVERY DEFENDANT IN A CRIMINAL CASE SHOULD BE ENTITLED TO CHALLENGE THE ADMISSION OF ANY EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH, FIFTH, OR SIXTH AMENDMENTS.

The issues of a co-defendant's or co-conspirator's standing are discussed in the brief in *Alderman* v. *United States,* No. 133, October Term 1967, and that filed on behalf of petitioner Butenko. The following discussion is limited to the question raised in the headnote.

"Standing" is a term which gives lawyers, scholars and courts considerable difficulty. See generally *Flast* v. *Cohen,* 392 U.S. 83, 20 L.ed.2d 947 (1968). Perhaps the confusion has been encouraged, if not engendered, by careless use of the term to refer to several quite distinct limitations upon the power and the willingness of federal courts to entertain claims of violation of federal rights. Search and seizure is not the only field in which it is important to identify the concept of standing under discussion, render it susceptible to analysis and evaluation, and exclude from the analysis the confusing intrusion of different concepts of standing. The varying and sometimes recondite uses of "standing" in the cases make this inquiry doubly difficult. For this case, "standing" must be analyzed in terms of the "person aggrieved" limitation of F.R. Crim.P. 41(e), the nature of fourth amendment rights, and the purposes of the exclusionary rule. This analysis leads ineluctably to the conclusion stated in the headnote to this section of the brief.

To begin, what meanings of standing may we exclude from discussion here? First, "standing" is sometimes used to refer to the procedural capacity of a litigant to sue or be sued. See Ehrenzweig, Conflict of Laws §§ 11-24.

Second, "standing" is sometimes used to denote a limit upon the judicial power, and to refer generally to the requirement that litigants have a genuine and not a sham contrariety of interests, both qualitatively and quantitatively. Cases in which the requisite "qualitative" adversity was lacking include *Muskrat* v. *United States,* 219 U.S. 346 (1911), and *FCC* v. *Sanders Brothers Radio Station,* 309 U.S. 470 (1940). The question is double-edged in these cases: Will the Court decline on the basis of judicially-fashioned rules of restraint to take the case (see *Muskrat*); and, on the other hand, may Congress bestow standing upon a class of litigants without falling afoul of the proscription on advisory opinions—stated affirmatively as the case or controversy requirement (see *Sanders Bros. Radio Station*). The "quantitative" dimension of standing was here last Term in *Flast* v. *Cohen,* 392 U.S. 83, 20 L.ed.2d 947 (1968), in which the Court limited *Frothingham* v. *Mellon,* 262 U.S. 447 (1923). *Frothingham* had rejected a taxpayers' suit directed at a federal statute upon the ground that the interest of a taxpayer in the outcome of the litigation was but a comminute share of the interest of the community at large, and not sufficiently direct and immediate. See also *Doremus* v. *Board of Education,* 342 U.S. 429 (1952).

A third use of the term "standing" has been in reference to questions essentially of ripeness. *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192 (1956), is such a case. There the FCC had adopted a rule stating that licenses for television broadcasting would not be granted if the applicant had a direct or indirect interest in more than five other stations. Storer, which had reached the limit under the rule, sued for a declaration that the rule was invalid. This Court concluded

that Storer had "standing" to sue, resting its decision upon a perception of the statutory judicial review standard and a finding of present harm to Storer. 351 U.S. at 197-99. The Court recognized that "standing," in the sense it had used the term, carried along with it the notion of ripeness. Taking the question before the court out of "standing" language, one could cast it as, "Should Storer have gone through the licence-application process before coming to court?" [12]

A fourth "standing" issue is that of "legal wrong," a term which appeared in § 10 of the old Administrative Procedure Act and which now appears in the judicial review provisions of recodified Title 5, 5 U.S.C. § 702. See *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 198-99 (1956); *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118 (1939). The "standing" issue in "legal wrong" cases really goes to the merits of the claim being asserted, for standing is denied or upheld based upon whether the harm complained of is legally cognizable.

A fifth definition has been essayed, and is relevant here: Closely related to the fourth meaning but distinct from it, is the issue of "standing" raised when *B* seeks to complain of a violation of rights which are said to "belong" to *A*. Mr. Justice Frankfurter termed this the problem of "directness." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 153-54 (1951). It must be kept in mind, in interpreting "person aggrieved" within the meaning of F.R. Crim.P. 41(e) (or the related language of 5 U.S.C. § 702 or even

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[12] This requirement may also be termed one of "finality." See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 154-156 (1951) (opinion of Frankfurter, J.).

the concept of access to the courts, considered in the abstract), that all of the foregoing five definitions of "standing" may operate to limit judicial review of illegal searches and seizures, though obviously in different ways. For example, if this Court should decide that a criminal defendant may challenge the admission into evidence against him of *any and all* material seized in violation of the fourth amendment, it might limit the rule to post-indictment motions under Rule 41(e), and retain the traditional concept of standing for pre-indictment Rule 41(e) motions. The ground for such a distinction might rest upon principles of "standing" in the sense of "ripeness": a potential defendant, not yet indicted, might be held to be not close enough to being harmed by illegality which did not violate "his" right of privacy. The Court might not, that is, wish to decide the fourth amendment question until it had to. See *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 155 (1951) (opinion of Frankfurter, J.).

In this case, however, the question of "standing" is of the fifth variety enumerated above, and the fourth amendment decisions of this Court have insisted that a defendant may complain only of violations of "his" fourth amendment rights, which are said to be "personal." See *Agnello* v. *United States,* 269 U.S. 20 (1925); *Jones* v. *United States,* 362 U.S. 257 (1960). The reasons for this rule are partly historical. See Brief for Petitioner John William Butenko, No. 197. Perhaps the reasons lie also in a feeling that to extend "standing" as here advocated would let too many criminals go free in consequence of constables' blunders, and that the remedy for illegal searches should be sought in the jurisprudence of Solomon rather than

that of Draco. *Cf.* Amsterdam, *Search, Seizure and Section 2255: A Comment,* 112 U. Pa. L. Rev. 379, 389 (1964). But the analogy to Solomon and Draco may teach another lesson, for it should be recalled that Solomon's solution to the problem of the disputed baby would not have satisfied the interest of either litigant. And there are cogent arguments that the doctrine of standing both angers law enforcement agencies (because of the application of the exclusionary rule) and encourages violations of the Constitution which, through artifice, turn up evidence held to be admissible, thus neither satisfying the interest it purportedly serves nor placating the interest it purportedly accommodates. Kamisar, *Illegal Searches and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure,* 1961 U. Ill. L. For. 78, 105; see also *People* v. *Martin,* 45 Cal. 2d 755, 290 P. 2d 855 (1955). In any case, there appears to be no reason inherent in the language or purpose of the fourth amendment for a restrictive view of "person aggrieved" under Rule 41(e). And looking to this Court's constitutional decisions in other fields, upholding *B*'s standing to invoke *A*'s right, one is brought quickly to the conclusion that in the field of search and seizure, *B* must be permitted to challenge a search of *A*'s premises. The closest case is *Barrows* v. *Jackson,* 346 U.S. 249 (1953). In *Shelley* v. *Kraemer,* 334 U.S. 1 (1953), this Court had held that a state court could not lend its hand in enforcing racial restrictive covenants in equity against Negro purchasers of real property. The Supreme Courts of Missouri and Oklahoma had taken the view that *Shelley* did not reach a suit in damages against a white seller for breach of such a covenant. *Weiss* v. *Leaon,* 359

Mo. 1054, 225 S.W. 2d 127; *Conell* v. *Earley,* 205 Okla. 366, 237 P.2d 1017. A principal question was that of the white seller-defendant's "standing" to complain of the equal protection violation.[13] Clearly she had standing in each of the four senses of the term first listed above. Both parties had procedural capacity, there was qualitative and quantitative ($11,600 in damages was claimed) contrariety, the claim was ripe for adjudication, and the "legal wrong" complained of lay within the Court's appellate jurisdiction. The standing issue was of the fifth type enumerated above, and the Court's discussion of it is highly relevant, for in *Barrows* the claim was raised—and rejected—that fourteenth amendment rights, being "personal," could not be raised indirectly or vicariously:

> "Consistency in the application of the rules of practice in this Court does not require us in this unique set of circumstances to put the State in such an equivocal position simply because the person against whom the injury is directed is not before the Court to speak for himself. The law will permit respondent to resist any effort to compel her to observe such a covenant, so widely condemned by the courts, since she is the one in whose charge and keeping reposes the power to continue to use her property to discriminate or to discontinue such use. The relation between the coercion exerted on respondent and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that re-

[13] This question would presumably no longer arise in quite the same form, although one could argue whether a white person would be "aggrieved" by a covenant in derogation of the Reconstruction statute construed in *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 20 L. ed. 2d 1189 (1968).

spondent is the only effective adversary of the unworthy covenant in its last stand. She will be permitted to protect herself and, by so doing, close the gap to the use of this covenant, so universally condemned by the courts.

"Petitioners argue that the right to equal protection of the laws is a 'personal' right, guaranteed to the individual rather than to groups or classes. . . . This description of the right as 'personal,' when considered in the context in which it has been used, obviously has no bearing on the question of standing. Nor do we violate this principle by protecting the rights of persons not identified in this record. . . ." 346 U.S. at 259.

The Court's conclusion in *Barrows* would no doubt command today almost universal acquiescence; it called forth at the time only one dissent from a voting member of the Court. And *Barrows* rests, as the quoted excerpt shows, largely upon the quite practical realization that if Mrs. Jackson could not assert the constitutional claim, the way would be open to subvert the teaching of *Shelley*.

Here, it may be urged, continued adherence to the ritual rules of standing leaves open the way to undermine *Katz* v. *United States,* 389 U.S. 347 (1967), *Mapp* v. *Ohio,* 367 U.S. 643 (1961), and *Weeks* v. *United States,* 232 U.S. 383 (1914). Law enforcement officials, well aware of the limits upon standing, have conspired to keep the principal victims of illegality out of court, see Comment, 34 U. Chi. L. Rev. 342 (1967), and thereby to garner advantage from unlawful conduct.

Tort remedies are theoretically possible in such a case, see *Lankford* v. *Gelston,* 364 F.2d 197 (4th Cir.

1966), although generally ineffective, see *Mapp*, 367 U.S. at 651-53, and in any event the tort remedy if generally pursued promises to cause far more disruption of the law enforcement process and call for far more disclosure of the "inner workings" of the investigative process than has yet been contemplated by any of the parties here or in *Alderman*. See *Elson* v. *Bowen*, 436 P.2d 12 (Nev. Sup. Ct. 1967). The inaccessability of the Courts to the victims of a constitutional violation has been a potent element in this Court's recognition that others than the nominal victims of illegality have standing to protest. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *NAACP* v. *Alabama*, 357 U.S. 449 (1958). And certainly when the petitioner wishing to assert the right has suffered or may suffer a criminal conviction, his claim must be given particular weight. *Cf. Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965).[14]

The confusion which has attended discussions of standing is surely understandable, for the writings of jurists and scholars—not to mention advocates—have not often been models of analytical clarity. It may be suggested that the standing restriction cases, by focusing upon the concept of fourth amendment rights as "personal," make a fatal error. All rights under a system of limited government may be denominated

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[14] Other "vicarious assertion" cases are collected and analyzed in Sedler, *Standing to Assert Jus Tertii in the Supreme Court*, 71 Yale L.J. 599 (1962), and in the opinions of Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 149 (1951). See also the opinion of Mr. Justice Jackson, which while it does not extensively discuss legal theory, characteristically takes a workmanlife and practical approach to the issues. 341 U.S. at 186-87. Compare the opinions of Mr. Justice Black, 341 U.S. at 142, and Mr. Justice Douglas, 341 U.S. at 174.

"personal" in one sense or another, but such an assertion does not advance—and may retard—analysis. The real question is whether he who wishes to assert the violation of a right is sufficiently affected by the violation that the court may take cognizance of his claim.[15] If the *B* who wishes to assert an intrusion into *A*'s house is a civil plaintiff, he had a difficult time in showing how he is hurt. Of course, if upon entering *A*'s house, the officers took a package belonging to *B*, the harm to him would be clear. See *Bumper* v. *North Carolina*, 391 U.S. 543, 20 L.ed.2d 797, 802 n. 11 (1968). But considerations applicable to civil plaintiffs, invoking the limited federal question jurisdiction of Article III courts, are hardly appropriate when considering the claims of criminal defendants, who stand to suffer a clear and present harm as a result of police illegality.

In sum, the issue of "standing" before the court in search and seizure cases, usually asked as "May *B* assert *A*'s right?," should be viewed in the context of this Court's consideration of "vicarious standing"

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[15] The rationale for the "personal right" fourth amendment decisions has been stated to be the relationship between the fourth and fifth amendments, a principle discussed in the Brief for Petitioner John William Butenko, No. 197. The self-incrimination rationale has some continued vitality in the field of private papers perhaps, but generally speaking it has been supplanted. Its last major exegesis, in *Frank* v. *Maryland*, 359 U.S. 360 (1959) was seriously undercut in *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) and *See* v. *City of Seattle*, 387 U.S. 541 (1967). See also *Linkletter* v. *Walker*, 381 U.S. 618 (1965); Comment, 34 U. Chi. L. Rev. 342 (1967). Even in the field of self-incrimination, this Court has taken steps to limit the use of extra-judicial admissions by *A* against *B*. See *Bruton* v. *United States*, 391 U.S. 123 (1968), and it may be doubted that the fruits of a confession extracted involuntarily from *A* should be usable in a separate trial of *B*.

in other fields. On this view, the following principles emerge with indisputable clarity:

> 1. The issue in a criminal case is not whether *B* may assert *A*'s right. *B* is the present victim of police illegality if unconstitutionally-seized evidence is sought to be used against him, and he is made so by the government's choice to proceed against him by making use of its ill-gotten gains. He is as much a victim as the civil defendant in *Barrows* v. *Jackson, supra.*[16]
>
> 2. The "standing" rule encourages police illegality and ensures that wrongs of the character here in issue will continue to go unrevealed and uncorrected. In cases of electronic surveillence, where the fourth amendment violation is deliberate and clear, and where its fruits are spread through dozens of files, the standing rule has proven to be the cloak for illegality beyond measure. See the testimony concerning so-called "intelligence investigations" set out in Brief for Petitioner, *Alderman* v. *United States,* No. 133, October Term 1967, p. 8 n. 8.

To preserve the fourth amendment, therefore, the "standing" requirement must be stripped of the ritualistic impedimenta which have hampered the development of truly effective weapons against lawless law enforcement, confused and confounded the fourth amendment's central meaning, and derogated from its great promise to "the people" generally of freedom from unlawful search.

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[16] Compare Davis, *Standing: Taxpayers and Others,* 35 U. Chi. L. Rev., #4 (Summer 1968), forthcoming, especially nn. 98-99 and accompanying text.

III. WHAT KIND OF REMAND?

The Solicitor General has not said whether the illegal surveillance picked up any conversations of counsel. See *Hoffa* v. *United States,* 387 U.S. 231 (1967). Whether or not such conversations were overheard, however, petitioner submits that a new trial should be ordered. Such an order would comport with the basic federal policy in favor of pretrial hearings on motions to suppress, *Battle* v. *United States,* 345 F.2d 438 (D.C. Cir. 1965); Comment, 54 Calif. L. Rev. 1070 (1966), a policy defeated in this case by the government's failure to make disclosure.

CONCLUSION

For the foregoing reasons, petitioner prays that his conviction be set aside, that the cause be remanded, and that if the government wishes to retry petitioner a full and fair hearing be held on the issue of illegal electronic surveillance.

Respectfully submitted,

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